No. 12755

United States Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE CO., a Corporation,
Appellant,

vs.

JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased, and UNITED STATES OF AMERICA, *Appellees*,

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JAMES G. MULROY, as Administrator of the Estate of Oscar Carl Johnson, Deceased,
Cross-Appellant.

vs.

FIREMAN'S FUND INSURANCE CO., a Corporation, and UNITED STATES OF AMERICA, *Appellees*,

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE AND CROSS-APPELLANT JAMES G. MULROY, AS ADMINISTRATOR OF THE ESTATE OF OSCAR CARL JOHNSON, DECEASED

JAMES G. MULROY,
Proctor for Appellee and Cross-Appellant.

1717 Smith Tower,
Seattle 4, Washington.

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JURISDICTION

Jurisdictional recital and statement of the case, contained in the brief of appellant Fireman's Fund Insurance Co., are believed by this appellee to be substantially correct and to conform to the allegations of appellee and cross-appellant's libel.

QUESTIONS PRESENTED

(1) If a *war prisoner* dies from illness while in enemy custody because of detention by his captor, hardships of imprisonment, or because the captor has deprived medical attendants of instruments or facilities needed for his effective treatment, is the death a proximate result of capture?

(2) Upon what contingency does liability, if any, accrue against the United States of America as a party litigant herein under Second Seamen's War Risk Act, where, at the time of death resulting from an act of war, a seaman was covered by commercial war risk insurance?

(3) When a war risk insurance policy has matured and become payable owing to the death of the insured under its terms, at what times does the principal sum of the insurance begin to bear interest?

WEIGHT TO BE ATTACHED TO FINDINGS OF THE TRIAL COURT

Inasmuch as most of the evidence presented was documentary, uncontroverted and in fact generally admitted by all parties involved in this action, the trial court's findings, based thereon, should properly be considered to be factually conclusive. Regarding oral testimony offered at the trial of this case, contrary to argument of appellant Fireman's Fund Insurance Co. (Appellant's Brief 6), the evidence of Dr. Slyfield, called as a medical expert, was controverted under cross-examination (Aps. 98-101) as well as by the attending physician's report, which was ad-

mitted in evidence without appellant's or other objection (Aps. Ex. 1, pp. 44-46).

Mr. Johnson's attending physician, Dr. Hugh Robinson, who treated him in the Japanese interment camp in or near Manila, reported (Aps. 46) that on or about February 7, six months before the decedent's death, no treatment would be effective except a surgical operation referred to as a "lobectomy." Although the leading thoracic surgeon in the Philippine Islands was available to perform this operation, the circumstances were such that he would not consider doing it because he had been deprived of some of his equipment (Aps. 46). On direct examination at the trial of this case, Dr. Slyfield, called as an expert witness (who was not a surgeon, but was a physician specializing in the United States in the same medical field as Johnson's attending physician, Dr. Robinson), diagnosed the medical case of a man who at the time of his diagnosis was deceased more than seven years, and whom he had never seen or examined; and Dr. Slyfield testified in one instance (Aps. 97) that in 75% of lung abscess cases the patient died, otherwise stated, one in four survived. In his testimony he also described an operation, used in lung abscess surgery, which on cross-examination (Aps. 99) turned out not to be a lobectomy at all. Also on cross-examination he admitted that there is no similarity between the surgical procedure he had described (Aps. 97) and later called a rib resection (Aps. 101), and a lobectomy.

Further, Dr. Slyfield, still being cross-examined, corrected his sights and took a second guess on the

mortality rate in lobectomy operations, and he then agreed that a patient's chance of survival therefrom was two to one (Aps. 99). According to this expert's testimony also, penicillin appears to have some potency or influence in medical treatment of lung abscess, since, he states that *prior* to its advent patients had a two to one chance of surviving the rib resection operation. No mortality figures, however, were given by this expert, in reference to the success of medical practice along this line *subsequent* to the advent of penicillin, which came into general use and was available in the United States in the year 1943, although just what part of that year Dr. Slyfield was "not sure about." In short, the doctor, who apparently was quite familiar with and definite as to the technical use (and retail price) of this comparatively new medicine (often referred to in current literature as a wonder drug), was unable, except vaguely, to fix a date when it became generally available in hospitals and to general medical practitioners in the United States (Aps. 100).

DECEDENT'S DEATH DUE TO WAR RISK

As asserted by appellant, the evidence in this case demonstrates that decedent seaman died August 6, 1943, of illness contracted before his interment in a Japanese prisoner of war camp.

It is to be noted, however, that Johnson signed articles for a voyage on the SS "Capillo," which was to terminate 100 days from its commencement, October 14, 1941, and, except for the destruction of the vessel in Manila Harbor by warlike acts of the enemy Jap-

anese then (December 29) at war with the United States, he would, under normal peacetime circumstances, have returned with his ship to the United States, approximately by April 1, 1942, where all necessary medical facilities, including penicillin, hospital care and all necessary instruments were, or would have been, available for the effective treatment of his condition.

SUMMARY OF ARGUMENT BY APPELLEE AND CROSS-APPELLANT

(1) Fireman's Fund Insurance Co. Policy No. 6922, issued October 17, 1941 (Aps. 47), was and is a valid war risk policy of insurance, which by its terms covered loss of life by Oscar Carl Johnson, deceased, and which became fully matured and payable upon his death, August 6, 1943, at which time he was a war prisoner in a Japanese interment camp in the Philippine Islands.

(2) Interest upon the proceeds of an insurance policy accrues at the time of its becoming a liquidated claim against the insurer.

(3) The United States of America as cross-appellee is a party properly liable in this action under the laws of the United States relating to seamen's war risk insurance policies, but only in the event that any liability under Fireman's Fund Insurance Co. Policy No. 6992 is finally determined to be invalid, inapplicable, or inadequate. In support of the foregoing Paragraph (3) the court's attention is referred to argument and citations contained in appellant's brief, pages 19 to 27, and therefore, that portion of said

brief is hereby adopted by this appellee and cross-appellant, save and except as the same may appear to be in conflict with the amended libel herein.

WHAT ARE WAR RISKS ?

First of all this appellee and cross-appellant insists that none of the decisions in the cases cited in appellant's brief at pages 15 to 18, inclusive, are based upon any facts properly comparable to those found in the present case; and they are, therefore, here not in point. The test of this is, what would have been the court's decision in each of the cited cases had the subject seaman involved been captured and died in prisoner of war camp, from illness where the effective treatment thereof was prevented by the circumstances of their imprisonment and the pleasure of their captors.

Regarding Johnson's death, it is contended by this appellee and cross-appellant that its occurrence was not the result merely of illness, but only therefrom when the same was combined with his captivity.

There is no case mentioned in this action, or to be found elsewhere, which has either ruled or indicated that a man's capture and confinement as a prisoner of war, and his loss of liberty or life therefrom is not the result of a warlike act.

Also to be considered upon this subject are the following decisions in situations believed to be analogous to this.

Runci v. United States, 82 F.Supp. 523. Heart attack, fatal six days after discharge from ship. The court said:

> "In the absence of any other cause for the sudden and fatal heart attack, I find that there was a close association between his death and his service."

Crist v. United States, 64 F.Supp. 934. Deceased, insured under 2nd Seamen's War Risk Policy, abandoned in life boat of unseaworthy sinking ship, because a nearby rescuing vessel feared submarine attack if she stood by.

> "It would appear therefore that the death of Theodore W. Ellse was purely the result of a war risk or a warlike operation and not the result of a maritime peril.
>
> "That cause is proximate which sets the other causes in motion."

Sutton v. United States, 73 F.Supp. 996. Sea captain had been for months subjected to "risks of war" while engaged in the Pacific Ocean within the Second Seamen's War Risk Policy. After heart attack captain's condition became so serious that he was confined to his bunk. The contract of insurance is predicated upon the amendment of March 24, 1943, to the Second Seamen's War Risk Policy, which reads:

> "Art. III.—'Risks and Perils': The insurance is for loss of life * * * of the insured directly and proximately caused by risks of war and warlike operations * * * acts of kings, princes and peoples in the prosecution of hostilities * * *."

Shrader v. United States, 180 F.(2d) 972. Murder of a seaman by insane soldier. "Proximate cause," for

purpose of determining liability under Second Seamen's War Risk Policy, is procuring and efficient cause not necessarily that which is last in time.

> "Giving a liberal construction to Shrader's policy * * * his death falls within its coverage."

INTEREST PAYABLE FROM MATURITY OF POLICY

Under the laws of the State of Washington interest is properly payable upon a liquidated account from the date it becomes due.

Remington Revised Statutes of Washington, §7299, and appendix:

> Every loan or forbearance of money, goods, or thing in action shall bear interest at the rate of six per cent per annum where no different rate is agreed to in writing between the parties.
>
> An amount liquidated and payable carries interest under Remington Revised Statutes, §7299, in the absence of a contrary agreement, and a liquidated deferred balance of such a sum carries interest.

Words and Phrases, Vol. 25, page 338:

> A demand is "liquidated" when the amount due or to become due is fixed by law or by agreement between the parties.

Washington Reports:

Weaver v. General Metals, 167 Wash. 451:

> "The amount fixed in the contract was a definite sum."

Barbo v. Norris, 138 Wash. 627 (at 640):

> "The amount due respondent was ascertained by a mere computation in which case interest is always allowable from the time the account accrued."

Hansen & Rowland v. Lytle Co., 167 F.(2d) 170.

Cyclopedia of Insurance Law, Vol. 7, page 6186, par. 1865:

> "As a general rule, the insurer is liable for interest from the time the policy becomes payable; that is from the date when the right of action first accrued according to the conditions of the policy, or when the amount payable has been made certain and has become due * * *."

Appellant in its brief, pages 28 to 32, claims exemption from payment of interest because of alleged failure by appellee to press this action to trial. The fact is, however, that there were never any delays in the prosecution of this suit to which the defendants were not entirely agreeable, and they were always acting in their own interest fully as much as for the benefit of the present appellee. Examination of the record will reveal that answers to the amended libel were only filed by Fireman's Fund Insurance Co. upon August 7, 1950, eight days before the trial date, and the answer of the United States of America was not filed until June 24, 1949, more than three years after commencement of the action.

Also, in this connection it should be borne in mind that under Washington State law this suit would have been timely if commenced at any time within six years after August 6, 1943.

SUMMARY

Appellee and cross-appellant now respectfully prays that the decree of the trial court be so modified as to grant to him a judgment in the sum of $5,000.00

against either the Fireman's Fund Insurance Company or the United States of America, whichever in the opinion of this court may be ultimately liable under the law and the facts in this case; and that such judgment shall be subject to interest thereon at six per cent per annum from August 6, 1943, until paid.

Respectfully submitted,

JAMES G. MULROY,
Proctor for Appellee and Cross-Appellant.